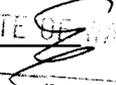


FILED
COURT OF APPEALS
DIVISION II

09 MAY -8 PM 1:37

STATE OF WASHINGTON
BY 

DEPUTY

NO. 38357-8-II

IN THE COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

CITY OF BONNEY LAKE, a Washington municipal corporation,

Appellant,

v.

JUST DIRT, INC., a Washington corporation,

Respondent.

APPELLANT'S REPLY BRIEF

Kathleen Haggard
WSBA #29305
Attorney for City of Bonney Lake

Dionne & Rorick
Attorneys at Law
900 Two Union Square
601 Union Street
Seattle, Washington 98101
Tel: (206) 622-0203
Fax: (206) 223-2003

ORIGINAL

TABLE OF CONTENTS

I. INTRODUCTION 1

II. ARGUMENT 4

 A. The remand of the preliminary plat was improper under LUPA and based on a flawed premise. 4

 B. It is Just Dirt’s responsibility, not the City’s, to offer mitigation for its project..... 6

 C. Just Dirt’s assertion that the City should have conditioned, rather than denied, preliminary plat approval rings hollow when Just Dirt showed no willingness to remedy the problems with the access road. 8

 D. Just Dirt’s failure to cross-appeal further underscores the impropriety of the remand..... 10

 E. The variance was properly denied based on the failure to provide mitigation for 176th Avenue Court E. 10

III. CONCLUSION 11

TABLE OF AUTHORITIES

Cases

Isla Verde Holdings v. City of Camas, 146 Wn.2d 740, 49 P.3d 867 (2000). 2
Kahuna Land Co. v. Spokane County, 94 Wn. App. 836, 974 P.2d 1249 (1999) 2
Lechelt v. City of Seattle, 32 Wn. App. 831, 835 P.2d 240 (1982)..... 2
Maranatha Mining v. Pierce County, 59 Wn. App. 795, 801 P.2d 985 (1990)..... 5, 7
Milestone Homes, Inc. v. City of Bonney Lake, 145 Wn. App. 118, 186 P.3d 357 (2008)
..... 4
Sylvester v. Pierce County, ___ Wn. App. ___, 201 P.3d 381, 386 (2009) 5

Statutes

RCW 36.70C..... 3
RCW 58.17.110..... 2

Other Authorities

BLMC § 14.70 6
BLMC § 17.20.040(g)..... 7

I. INTRODUCTION

Respondent accuses the City of having a “myopic” focus on the adequacy of the access road into the Shipman Ridge subdivision.¹ But it is entirely appropriate for the City to focus on this issue, because that is the reason the City Council denied subdivision approval.² The record establishes that the City asked Just Dirt, in clear and unambiguous terms, for information about the structural integrity of 176th Avenue Court East and its ability to serve as an access road into a new 34 lot subdivision.³ After Just Dirt made no apparent effort to supply this information, the City Council denied subdivision approval.⁴

Just Dirt attempts to hide this glaring omission by focusing on what it did do—for example, make a minor adjustment in density from 39 to 34 units, reconfigure its project from attached homes to detached homes, and abandon the plan for an access route off SR 410.⁵ The City Council acknowledged Just Dirt’s

¹ See Brief of Respondent at p. 6.

² See Resolution 1777, CP 224-26 (basing denial of plat approval solely on lack of traffic mitigation).

³ VTP 6-9; CP 275-76, 278-79.

⁴ CP 35 (“In May 2007, the City Engineer gave the Applicant written notice of the traffic problems that the proposed access off 176th Avenue Court E would cause, and requested that the Applicant ‘provide an evaluation of the adequacy of 176th Avenue Court E and 176th Avenue E (structural integrity of the existing roadway lane widths, shoulders, etc.) to accommodate the increased traffic levels, as well as recommendations for any needed upgrades to local roadways.’ The Applicant did not provide an evaluation responsive to this request.”); CP 224 (incorporating findings of Resolution 1770).

⁵ Brief of Respondent at pp. 8-10.

efforts by abandoning most of the Hearing Examiner’s negative findings, as well as some of the positions taken by former planning staff.⁶ But none of these efforts addressed the one remaining problem—that 176th Avenue Court E, without mitigation and upgrades, is inadequate to serve as an access road into a new 34-lot subdivision.

The Shipman Ridge plat as proposed failed to comply with the State law, which requires subdivisions to ensure adequate “streets, roads, and other public ways.”⁷ Just Dirt has no convincing arguments that such a steep and narrow street, lacking sidewalks and having a 90 degree bend at its steepest point, could safely accommodate the new traffic its subdivision would generate. Rather, Just Dirt would rely upon drivers to “drive more slowly.”⁸ Efforts that Just Dirt may have made to address other issues become irrelevant in the face of its simultaneous

⁶ For example, while planning staff and the Hearing Examiner both recommended denial of the plat based on a violation of density requirements, the City Council rejected this argument. CP 224 (“The Hearing Examiner’s findings and conclusions with regard to the plat’s density calculation are rejected in their entirety.”). In addition, the City Council, unlike staff or the Hearing Examiner, made favorable findings on the requested conditional use permit for lot narrowing. *Id.*

⁷ RCW 58.17.110; *Isla Verde Holdings v. City of Camas*, 146 Wn.2d 740, 766, 49 P.3d 867 (2000); *Lechelt v. City of Seattle*, 32 Wn. App. 831, 834, 835 P.2d 240 (1982) (“Agencies reviewing plat applications must consider the adequacy of access to and within the proposed subdivision, and may condition approval of the plat upon the provision of adequate access.”); *see also Kahuna Land Co. v. Spokane County*, 94 Wn. App. 836, 843, 974 P.2d 1249 (1999) (“The conditions placed on Kahuna’s development serve the legitimate public purpose of insuring adequate access to the property. . .”).

⁸ Brief of Respondent at p. 30. Respondent’s statement to the effect, “Obviously, the East Ridge Estates homeowners have successfully and safely utilized the existing road” lacks the support of any evidence in the record. Rather, the record is loaded with comments from the East Ridge Estates homeowners complaining about the road’s steep topography and narrowness. VTP 68-86.

failure to supply an adequate access road. Ultimately, Just Dirt's efforts did not enable the City Council to make the findings it is required to make under State law, and the City's only option was to deny plat approval.

The trial court properly found that Just Dirt did not meet its burden of proving that the subdivision should have been approved as proposed. At that point, the trial court should have sustained the City Council's denial of the plat. But instead, the trial court remanded the case to the City for consideration of an entirely new proposal by Just Dirt. This was improper under the Land Use Petition Act (LUPA), RCW 36.70C. Furthermore, the remand was based on a faulty premise—that the City had somehow concluded that “no development could occur on site.”⁹ No City official or body ever came to this “conclusion”; the trial court seems to have invented it.

The trial court's reversal of the variance denial was also in error. In finding that Just Dirt did not meet its burden of proving that the plat should have been approved, trial court implicitly found that Just Dirt had failed to ensure an adequate access road into the plat. Yet, the trial court reversed the variance denial simply on the finding that the cul-de-sac was “temporary” rather than “permanent.” City staff had interpreted this cul-de-sac as permanent, and absent clear error, its

⁹ CP 650 (“Substantial evidence does not support the City's conclusion that no development can occur on the site.”).

interpretation is entitled to deference. See, e.g., *Milestone Homes, Inc. v. City of Bonney Lake*, 145 Wn. App. 118, 186 P.3d 357 (2008).

For all these reasons, the trial court's order of remand should be reversed, and the City Council's denial of preliminary plat reinstated.¹⁰ The trial court's order reversing denial of the variance should also be reversed.

II. ARGUMENT

A. The remand of the preliminary plat was improper under LUPA and based on a flawed premise.

Just Dirt emphasizes that LUPA gives the trial court authority to order a remand.¹¹ While this is true, a remand was improper in this case. No authority supports remanding a LUPA case in order to compel a city to consider an entirely new proposal for an entirely reconfigured subdivision.

As explained in the City's opening brief, LUPA decisions are supposed to be based upon the existing administrative record. If a petitioner fails to meet its burden of proving that the land use decision lacks the support of substantial evidence or is contrary to law, the land use decision must stand.¹² Just Dirt contends that the trial court merely remanded "to the City for consideration of

¹⁰ As further explained below, Just Dirt has not cross-appealed the trial court's finding that it failed to meet its burden of proving that the City Council should have approved the plat as proposed.

¹¹ Brief of Respondent at 33-34.

¹² See Brief of Appellant at Section V.B.2.

appropriate mitigation measures.”¹³ But the trial court went further than this, suggesting that on remand Just Dirt could submit an entirely new plat, with new density, configuration, roads, and access. Neither LUPA nor its case law authorize a remand so that an applicant can craft an entirely new proposal, especially when the plat as proposed had already been through the entire process contained in the Municipal Code—from determination of completeness to public hearing to City Council review. *See, e.g., Sylvester v. Pierce County*, ___ Wn. App. ___, 201 P.3d 381, 386 (2009) (noting trial court denial of motion to remand back to hearing examiner so litigants could add more evidence); *Maranatha Mining v. Pierce County*, 59 Wn. App. 795, 806, 801 P.2d 985 (1990) (rejecting request for remand when existing record supported only approval of land use application).

Moreover, the trial court based the remand on a flawed conclusion: that the City believed no development could occur on the site.¹⁴ Nowhere in the record does any city employee, official, or body conclude any such thing. Rather, the denial of the plat was based solely upon the lack of proposed traffic mitigation. Even a cursory review of Resolution 1777, which denied preliminary plat approval, disproves the existence of such a finding.¹⁵ Instead, the Resolution suggests that

¹³ Respondent’s Brief at p. 2.

¹⁴ *See* CP 650.

¹⁵ *See* CP 224-26.

the Council would have approved the plat if Just Dirt had proposed agreeable upgrades and traffic mitigation for 176th Avenue Court E.

In the face of such clear language from Resolution 1777, it is truly a mystery why the trial court concluded that the City felt “no development could occur on site.” But this faulty premise further undermines the trial court’s decision to order a remand. Essentially, the trial court sent the parties back to the drawing board, sending a message that they should “work it out.” But LUPA does not authorize the trial court to “split the baby;” rather, the trial court’s sole task is to determine whether the petitioner met its burden of proving that the land use decision lacked support in the facts and law. If the Petitioner fails in this burden, the local government’s decision must stand.

B. It is Just Dirt’s responsibility, not the City’s, to offer mitigation for its project.

As noted, Just Dirt has never produced a plan for upgrades or mitigation efforts for 176th Avenue Court E, other than suggesting that drivers “drive slower.” Just Dirt instead suggests that it is the City’s responsibility to inform it of the acceptable mitigation measures. But it is up to the Petitioner, not the City, to propose mitigation for this project. Applicants engineer their own proposals, with the local government acting as the reviewing authority.¹⁶

¹⁶ See Chapter 14.70 BLMC (indicating that the role of the City is as reviewing agency).

Just Dirt also ignores the fact that the City's requests for information and studies on the adequacy of 176th Avenue Court E were a first-ditch effort to establish what the required mitigation and upgrades would be.¹⁷ Just Dirt's failure to recommend any upgrades frustrated any attempts the City might have made to settle on mitigation.

The Petitioners recite the quotation from *Maranatha Mining*, 59 Wn. App. 805, suggesting that it is "improper to deny the permit to an applicant, who, throughout the application process, has demonstrated a willingness to mitigate any and every legitimate problem."¹⁸ But it is not true that the Petitioner has already mitigated "any and every legitimate problem" caused by this plat. There is no evidence that the Petitioner has studied the effects of punching a road through an existing, substandard cul-de-sac, supplied a SEPA checklist for this proposal (as required by BLMC § 17.20.040(g) or developed a mitigation plan to deal with traffic flows. The only considerations Just Dirt made for the road was to "provide for sanding in inclement weather," obligate future homeowners to participate in road maintenance, and make the road private rather than public.¹⁹ But none of these offers responded to the concerns repeatedly articulated by the City Engineer—

¹⁷ See CP 278-79 (asking for a specific assessment of 176th Avenue Court E and 176th Avenue E in terms of geometry, maneuverability, structural integrity, lane widths, and shoulders, as well as "recommendations for any needed upgrades to local roadways").

¹⁸ Brief of Respondent at 1.

namely, that the structural integrity, width, and grade of the road needed to be studied, and Just Dirt needed to propose upgrades.²⁰

C. Just Dirt’s assertion that the City should have conditioned, rather than denied, preliminary plat approval rings hollow when Just Dirt showed no willingness to remedy the problems with the access road.

Just Dirt repeatedly suggests that the City Council should have approved the proposed subdivision on the condition that Just Dirt make sufficient upgrades

¹⁹ VTP at pp. 60-61.

²⁰ As noted in the City’s Opening Brief, City staff consistently communicated that 176th Avenue Court East would require upgrades to support the new development. In January 2007, City Engineer John Woodcock wrote a memorandum to the Hearing Examiner, as a comment to the Draft Environmental Impact Statement (DEIS), stating that using 176th Avenue Court East as an access route for Shipman Ridge was not acceptable without mitigation and upgrades. This memorandum states:

Thirty-nine (39) units is too large a development to rely on such a means of access. Adequate street width, reasonable grade, and reasonable cul-de-sac length are essential for a residential proposal of this size. The proposed homes would not be sufficiently accessible (including police, medical response, and fire access) during inclement weather due to steep roads and long cul-de-sac. Driving safety, ease of access, traction in snow and ice, and emergency vehicle access would not be acceptable.

In this same memorandum, Mr. Woodcock also pointed out that the traffic impacts of opening the cul-de-sac “have NOT been mitigated.” In May 2007, Mr. Woodcock wrote a letter to Just Dirt, requesting that it provide:

[A]n assessment of the 176th Ave. Ct. E access for overall circulation and adequacy of the geometry to serve general ingress and egress to the project. Verify that emergency services can maneuver around the corner without encroaching on the future curb and sidewalk.

and

[A]n evaluation of the adequacy of 176th Avenue Court E and 176th Avenue E (structural integrity of existing roadway, lane widths, shoulders, etc.) to accommodate the increased traffic levels, as well as recommendations for any needed upgrades to local roadways. See CP 275-76, 278-79 (emphasis added).

to 176th Avenue Court E to support the traffic flow.²¹ This position is without merit. For one thing, such a scenario is not before the Court because Just Dirt did not cross-appeal the trial court's finding that the plat could not be approved as proposed.²² For another thing, by the time the subdivision reached the Council level, Just Dirt had already shown itself unwilling to study the effects of new traffic on the access road. The City Council had no reason to believe that Just Dirt would comply if the plat were approved. Granting a conditional approval would have been improper because it would have set Just Dirt up with a condition it had already shown it was unwilling to satisfy. Setting up such a condition could have led the parties to the same result reached in this case.

Furthermore, Just Dirt complains that the City somehow withheld information or failed to articulate its requests "with any specificity,"²³ thereby depriving Just Dirt of the ability to respond to concerns. The record shows otherwise. As noted, Just Dirt was informed, in writing, on more than on occasion, that 176th Avenue Court E was inadequate to serve as an access road without upgrades and mitigation. These concerns were not ambiguous. Just Dirt even

²¹ Brief of Respondent at p. 1, 16. Just Dirt does not offer what the proposed condition would be.

²² See *infra* Section II.D of this Brief.

²³ Brief of Respondent at p. 6.

admits that 176th Avenue Court East was a “primary issue raised in the FEIS,”²⁴ and does not claim that it responded when these concerns were raised.

D. Just Dirt’s failure to cross-appeal further underscores the impropriety of the remand.

Just Dirt could have appealed the trial court’s refusal to order that the proposed plat be approved “as is,” but it failed to do so. This failure to appeal is telling. It shows that the Respondent has no grounds to dispute the exhaustive evidence regarding the inadequacies of 176th Avenue Court E as an access road for Shipman Ridge. In fact, Just Dirt effectively concedes that State law does not authorize the approval of its subdivision.

The failure to appeal also underscores the impropriety of the trial court’s remand. The question of whether the plat complied with State law is not before the Court. Rather, the sole question is whether—given the accepted fact that the proposed plat does not comply with State law—it was proper to remand to allow Just Dirt to submit an entirely new plat. Pursuant to LUPA, the answer is no.

E. The variance was properly denied based on the failure to provide mitigation for 176th Avenue Court E.

It is important to emphasize again that approval of the subdivision does not stand or fall on whether the variance for cul-de-sac extension should have been granted. Just Dirt has a separate and independent obligation under State law to

²⁴ Brief of Respondent at 7-8.

make adequate provision for roads and streets as a prerequisite to preliminary plat approval, so whether the variance is granted is somewhat of a red herring.

Still, the trial court erred in reversing the City Council's decision based solely on the conclusion that the cul-de-sac at issue was not "permanent." The court should have deferred to City's construction of a term in its own ordinance, as the weight of evidence supported this interpretation.²⁵ As explained more thoroughly in the City's Opening Brief, overwhelming weight of public policy supports requiring developers to make adequate provision for traffic safety on their subdivision access routes, and the public works development standards contained within BLMC Title 17 are intended to effectuate this policy. Without any proposals for traffic mitigation, the variance application violated the letter and intent of BLMC Title 17, and thus the City Council properly denied the variance.

III. CONCLUSION

The trial court agreed that Just Dirt failed in its burden of proving that the City Council's denial of the preliminary plat application lacked support in the facts and law. Having concluded this, the trial court should have stopped there and sustained the Council's decision, rather than remanding the matter back for consideration of an entirely new proposal. The trial court also erroneously reversed

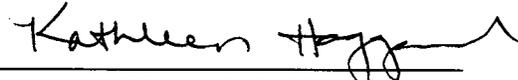
²⁵ VTP 64-64, CP 252-73.

the denial of the variance, even though Just Dirt offered no traffic mitigation, based solely on the belief that the cul-de-sac was temporary and not permanent.

For the foregoing reasons, the City respectfully requests that this Court reinstate the City Council's decisions on both the plat and variance.

RESPECTFULLY SUBMITTED this 8th day of May, 2009.

DIONNE & RORICK



By: Kathleen Haggard, WSBA #29305
Attorneys for City of Bonney Lake

G:\bonlk\116a\90508reply.brf.doc

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that I sent *via legal messenger*, the Appellant's Reply Brief to the following:

Margaret Archer
Gordon, Thomas, Honeywell,
Malanca, Peterson & Daheim
Wells Fargo Plaza
1201 Pacific Avenue, Suite 2100
Tacoma, Washington 98402

Washington State Court of
Appeals, Division Two
David Ponzoha,
Clerk/Administrator
950 Broadway, Suite 300
Tacoma, Washington 98402-4454

Dated this 8th day of May, 2009.



By: Cynthia Nelson

g:\bonlk\116a\90508reply_cert.pld.doc

FILED
COURT OF APPEALS
DIVISION II
09 MAY -8 PM 1:37
STATE OF WASHINGTON
BY  DEPUTY